JURISDICTIONAL STATEMENT

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Nature of case and statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	5
Interpretation of conditions of bills of lading	6
Dates of judgments and appeals	8
Manner is which Federal questions were raised	9
The Federal questions involved are substantial	10
Appendix "A"—Opinion of the Supreme Court of Louisiana	17

Table of Cases Cited

Bills of Lading, 52 I. C. C. 671	13
Charleston & Western Carolina Ry. Co. v. *Varnville Furniture Company*, 237 U. S. 597	12
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. *Dettlebach*, 239 U. S. 588	15
Courteen v. *Kanawha Dispatch Co.*, 40 Wisconsin 610, 86 N. W. 176	13
Missouri Pacific Railroad Co. v. *Porter*, 273 U. S. 341	12
Pennsylvania R. Co. v. *Public Utilities Commission of Ohio*, 298 U. S. 170	11
Southern Pacific Terminal Company v. *Interstate Commerce Commission*, 219 U. S. 498	11
Texas & Pacific Ry. Co. v. *Railroad Commission of La.*, 183 Fed. 1005, 1007	11

Statutes Cited

Judicial Code, Sec. 237(a), as amended	1, 16
Louisiana Act 29 of 1908	3, 5, 10
Interstate Commerce Act (24 Stat. L. 379, as amended)	4
Section 1 (6)	8, 10
Section 12 (1)	10
Section 13 (4)	12
Section 15 (1)	10
Constitution of the United States, Commerce Clause, Art. I, Sec. 8	8

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 197

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Appellant,

vs.

V. RIVERA S. EN C.,
Appellee

APPEAL FROM THE SUPREME COURT OF LOUISIANA

STATEMENT AS TO JURISDICTION

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344(a)) from a final judgment of the Supreme Court of Louisiana entered May 26, 1947, application for rehearing being denied June 16, 1947. The questions thereby presented and the facts from which they arise may be briefly stated as follows:

On January 3, 1942, a suit entitled "V. Rivera S. en C. *vs.* Texas and New Orleans Railroad Company, et al." was

filed in the Civil District Court for the Parish of Orleans, State of Louisiana, in which the said plaintiff sought damages in the sum of $2700.00 against Texas and New Orleans Railroad Company and Bienville Warehouses Corporation, defendants. The cause of action asserted was the loss of certain shipments of rice destroyed by fire in New Orleans, Louisiana, on March 12, 1941, while in the possession and custody of the defendant Railroad.

The shipments in question, three in number, were made on January 25, 1941, by Dal-Gar Rice Mill, Inc., from Crowley, Louisiana, where they were delivered to the defendant Railroad, a common carrier by railroad which issued its three separate negotiable bills of lading thereon, each such bill of lading being on the through export form approved by Interstate Commerce Commission. As appeared from the said bills of lading, the ultimate destination of the shipments was Aguadilla, Porto Rico, and the consignee in each case was "Shipper's Order," notify V. Rivera S. en C. the plaintiff. The bills of lading provided for the movement of the shipments from Crowley, Louisiana, to New Orleans, Louisiana, by the railroad of defendant Railroad Company, and thence by steamers of the Waterman Steamship Line to Aguadilla, Porto Rico. On each bill of lading a different steamer and a different sailing date was shown, all of the said sailing dates being subsequent to March 12, 1941.

The three shipments arrived in New Orleans, Louisiana, on January 26, 1941, and on the next day were, by the defendant Railroad Company, unloaded from the cars into its Bienville depot in the said City, there to be held by it, pending arrival in New Orleans of the steamers on which the rice was to go to Porto Rico. While being so held and stored the rice was, on March 12, 1941, destroyed by a fire which consumed the entire building in which it was stored.

The contention of defendant Railroad was and is that its

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relationship to the shipments in question at the time of the fire was that of a warehouseman, and not a common carrier, and that it was guilty of no negligence causing or contributing to the said fire. Various appropriate provisions of the conditions of the bills of lading (the form of which had been approved by the Interstate Commerce Commission) were pleaded and proved as establishing that long prior to March 12, 1941, the legal relationship of the Railroad to the shipments had become and was that of a warehouseman.

In the said suit plaintiff claimed a penalty of $50.00 on each shipment under and by virtue of Act No. 29 of the General Assembly of the State of Louisiana, passed at the Regular Session of 1908, which provided that

> "* * * every claim for loss of or damage to property or freight while in the possession of any common carrier doing business in this State shall be adjusted and paid within thirty (30) days in case of shipments wholly within the State and within sixty (60) days in case of shipments from without the State after the filing of such claim with the agent of such common carrier at the point of destination of such shipment * * *"

and that on failure so to adjust and pay such claim, the carrier shall be subject to a penalty of Fifty Dollars ($50.00) for each such failure; and plaintiff alleged, as to the shipments in question, the filing of claims and the failure to pay them within sixty (60) days from such filing.

As against this claim of plaintiff for such penalties, defendant Railroad, in its original answer, expressly and specifically pleaded that the State Statute relied on, as applied to the shipments in question (in interstate or foreign commerce and under bills of lading of a form prescribed by the Interstate Commerce Commission) was repugnant to Article I, Section 8 of the Constitution of the United States conferring on the United States the power

to regulate commerce between the several states and foreign countries, which power was exercised by the enactment of the Interstate Commerce Act (Act of February 4, 1887, 24 Stat. L. 379), as amended, and more particularly the prescription by the Interstate Commerce Commission of the form and conditions of bills of lading, the bills involved in this case having been in the form so prescribed, so that any power of the State of Louisiana to legislate in regard to the measure of damages in connection with interstate or foreign shipments, or to impose any penalty in regard to the payment of claims thereon, was completely removed.

The said Civil District Court for the Parish of Orleans, on June 20, 1946, entered its judgment in favor of the defendants dismissing the suit. From that judgment the plaintiff appealed to the Supreme Court of Louisiana, in which the case was argued and submitted on April 24, 1947. That Court on May 26, 1947 handed down its opinion and decree reversing the judgment of the District Court and entered judgment in favor of plaintiff and against defendant, Texas and New Orleans Railroad Company in the sum of Twenty-seven hundred and forty-eight Dollars and Ninety-nine Cents ($2748.99) with five (5) per cent per annum interest from April 17, 1941 until paid, and for the additional sum of One Hundred and Fifty Dollars ($150.00), together with all costs. On June 7, 1947 your petitioner filed in the said Court an application for a rehearing, which application was denied on June 16, 1947.

As will appear from the opinion handed down by the Supreme Court of Louisiana, judgment was entered against defendant Railroad for One Hundred Fifty Dollars ($150.00) representing the Fifty Dollar ($50.00) penalty on each shipment under the State Statute above mentioned.

As will further appear from the said opinion, the sole basis on which liability of the said defendant Railroad was

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predicated was that its relationship to the shipments in question was that of a common carrier, this conclusion in turn being based on the finding that under the bill of lading provisions relied on by said defendant there had been no tender of the shipments by said defendant to Waterman Steamship Lines, despite the fact that written notice of arrival of each of the said shipments was given to Waterman Steamship Lines by said defendant within a day or two after the arrival of the said shipments in New Orleans. This holding constituted an interpretation by the State Court of the bill of lading provisions and the applicable tariffs and classifications, which presents a federal question.

II. State Statute the Validity of Which Is Involved

There was thus drawn in question the validity, under the Commerce Clause, of a statutory provision of the State of Louisiana. The statute in question, being *Act No. 29* of the General Assembly of the State of Louisiana, passed at the Regular Session of 1908, reads as follows:

> "AN ACT to regulate the manner in which common carriers doing business in this State shall adjust claims for loss of or damage to freight and providing penalties for failure to settle same within time prescribed and for collection thereof.
>
> "Section 1. Be it enacted by the General Assembly of the State of Louisiana that every claim for loss of or damage to property or freight while in the possession of any common carrier doing business in this State shall be adjusted and paid within thirty (30) days in case of shipments wholly within the State and within sixty (60) days in case of shipments from without the State after the filing of such claim with the agent of such common carrier at the point of destination of such shipment provided that no such claim shall be filed until after the arrival of the shipment or some part

thereof at the point of destination or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage together with legal interest thereon from the date of the filing of the claim therefor until the payment thereof.

"Section 2. Be it further enacted, etc., That in case of failure of such common carrier to adjust and pay such claim within the periods respectively herein prescribed such failure shall subject such common carrier so failing to a penalty of Fifty (50) Dollars for each and every failure to be recovered by any consignees aggrieved in any Court of competent jurisdiction; provided that unless said consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of loss or damage with legal interest as aforesaid; provided, further that no common carrier shall be liable under this Act for freight or property which never came into its possession.

"Section 3. Be it further enacted etc., That this Act shall go into effect from date of its promulgation, and that all laws or parts of laws in conflict therewith be and the same are hereby repealed."

III. Interpretation of Condition of Bills of Lading

There was thus drawn in question the interpretation of conditions of bills of lading covering shipments in interstate or foreign commerce prescribed by the Interstate Commerce Commission.

The particular bill of lading conditions relied on were as follows:

"1 (b) * * * The carrier's liability shall be that of warehouseman, only, for loss, damage or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port

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of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at the port of export, or tender of delivery of the property to the party entitled to receive it, has been made. * * *"

"5. (a) Property not removed by the exporting carrier, or the party entitled to receive it, within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at port (A) has been duly sent or given, and after placement of the property for delivery at port (A), or tender of the property for delivery upon order of the party entitled to receive it has been made, may be kept in vessel, car depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to the carrier's responsibility as warehouseman, only, or, at the option of the carrier, may be removed to and stored in a public or licensed warehouse at port (A), or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

"10. (a) No carrier shall be liable for delay not occurring on its own line, or not the result of its negligence, nor in any respect other than as warehouseman, while the property awaits further conveyance after proper tender of delivery to the next connecting carrier has been made, and if the whole or any part of the property specified herein be prevented by any cause from going from the port of export in the vessel for which intended, the carrier hereunder then in possession is at liberty to forward said property by another vessel of the ocean carrier, or, if deemed necessary, by any other vessel dispatching notice thereof to the shipper and consignee."

The Contract Terms and Conditions of each of the three bills of lading in question (they being identical as to form) were divided in three parts, Part I with respect to the serv-

ice until delivery at the Port (A) and until delivery at the Port (B), by which was meant Aguadilla, Porto Rico, and Part III with respect to the service after delivery at the Port (B). The three conditions above quoted are found in Part I, that being the Part applicable to the shipments while held in New Orleans awaiting delivery to the ocean carrier.

The said bills of lading, and the particular provisions thereof, relied on were in the form prescribed by the Interstate Commerce Commission. The said Commission in prescribing the form of bills of lading acted under the authority conferred on it by Section 1(6) of the Interstate Commerce Act, and such action by the said Commission, as well as the action of Congress in enacting the Interstate Commerce Act, was based on the power conferred on the United States by Article I, Section 8 of the Constitution reading:

> "The Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States * * *".

IV. Dates of Judgments and Appeals

The judgment of the Civil District Court for the Parish of Orleans, dismissing plaintiff's suit was dated June 20, 1946, but, on appeal, the Supreme Court of Louisiana plainly sustained the constitutionality under the Commerce Clause of the Statute of Louisiana referred to above; and the said Supreme Court of Louisiana interpreted the bill of lading provisions, referred to above, adversely to the contentions of defendant Railroad.

The judgment of the Supreme Court of Louisiana was entered on May 26, 1947, and application for a rehearing by defendant Railroad was denied on June 16, 1947. Petition for appeal to this Court was presented to the Honorable Charles A. O'Niell, Chief Justice of the Supreme Court of

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Louisiana, on June 17, 1947, and was by him allowed the same day.

V. Manner in Which Federal Questions Were Ra' ed

The Federal questions were raised at the outset and urged throughout all the proceedings in the State Courts.

As to the State Statute, referred to above, Article XVI of the original answer of defendant Railroad specifically and formally plead, with reference to said statute, that if held applicable to the claims involved in this suit,

> "• • • such holding would contravene Article I, Section 8 of the Constitution of the United States vesting in the Congress of the United States power to regulate commerce among the several states, the said Congress having acted under the power so given it by the enactment of the Interstate Commerce Act (Act of February 4, 1887, 24 Stat. L., 379), as amended, and particularly Paragraph II of Section 20 thereof, and the Interstate Commerce Commission having prescribed the form and conditions of the bill of lading to be used in connection with a shipment of the type involved in this suit, and such form having actually been used in connection with the present shipments, so that any power of the State of Louisiana to legislate in regard to the measure of damages in connection with interstate shipments, or to impose any penalty in regard to the payment of claims thereon, has been completely removed."

In application for a rehearing, timely filed with the Supreme Court of Louisiana on June 7, 1947, the same contentions were renewed, and in the brief filed in support of said application they were elaborated.

As to the interpretation of the bill of lading provisions, referred to above, defendant Railroad, in Article V of its original answer, specifically pleaded the said provisions as having converted its relationship to the shipments in ques-

tion to that of a warehouseman on and long before March 12, 1941, the date on which the fire occurred. This contention was urged throughout the trial of the case in the Civil District Court for the Parish of Orleans, and accepted by that Court in its judgment. It was strenuously urged on brief and at bar before the Supreme Court of Louisiana, and it was renewed in the application for a rehearing and in the brief in support thereof.

The opinion of the Supreme Court of Louisiana, a copy of which is appended to this statement, affirmatively shows that the Federal questions relied on were presented to, considered and decided by it.

VI. The Federal Questions Involved Are Substantial

(a) *The Louisiana Statute.* The Commerce Clause of the Constitution conferred on the United States the power to regulate interstate and foreign commerce. By the passage of the Interstate Commerce Act Congress exercised the right thus conferred on it. Section 1(6) of the Interstate Commerce Act requires all common carriers to

> "• • • establish, observe, and enforce • • • just and reasonable regulations and practices affecting • • • the issuance, form and substance of • • • bills of lading • • •."

Among the duties required of the Interstate Commerce Commission is the general one to "enforce the provisions of this chapter" Section 12(1).

Under Section 15(1) of the Interstate Commerce Act, the Commission is given the power

> "• • • to determine and prescribe what • • • practice is or will be just, fair, and reasonable, to be thereafter followed • • •."

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Pursuant to the powers given to the Interstate Commerce Commission, that Commission prescribed the form and conditions of various types of bills of lading, including the through export bill of lading, being the precise form of bill of lading involved in the present case.

Section 3 of Part I of the said form of bill of lading provided, so far as relevant, that:

> "The amount of any loss, damage, including loss or damage arising from delay for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment under this bill of lading * * *
>
> "Claims for loss, damage, or delay must be made in writing to the carrier at the port of export or to the carrier issuing this bill of lading within nine months after delivery of the property at said port "A", or, in case of failure to make such delivery, then within nine months after a reasonable time for such delivery has elapsed * * *."

That the Interstate Commerce Act applies to foreign shipments even when they move from within a State to a port of export within the same State has repeatedly been held. *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498; *Pennsylvania R. Co.* v. *Public Utilities Commission of Ohio*, 298 U. S. 170; *Texas & Pacific Ry. Co.* v. *Railroad Commission of La.*, 183 Fed. 1005, 1007.

The effect of the Louisiana Statute, if applicable to shipments covered by the Interstate Commerce Act, would be to add in the case of each such shipment $50.00 to any claim not paid within sixty days of the date of the filing of the said claim.

As this Court said in holding unconstitutional an almost identical statute of South Carolina:

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a State law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

Charleston & Western Carolina Ry. Co. v. *Varnville Furniture Co.*, 237 U. S. 597, 604. To the same effect is *Missouri Pacific Railroad Co.* v. *Porter*, 273 U. S. 341.

If applicable to shipments in interstate commerce, it is clear that the Louisiana Statute would place an unreasonable and unlawful burden on such commerce and would bring about an undue and unreasonable advantage and preference in favor of Louisiana shippers or receivers in whose favor the Statute might operate, as reprobated by Section 13(4) of the Interstate Commerce Act.

The general importance of a proper solution of the question presented is obvious, for it would come up in every claim against a railroad in connection with an export shipment when the claim is not paid within the time allowed by the Louisiana Statute or any other similar State statute. It is also submitted that if such statutes are good, claimants in particular States will be preferred over claimants in other States.

(b) *The Bill of Lading Question.* When the Interstate Commerce Commission prescribed the form of the through export bill of lading it did so with the realization that the obligations in connection with such a movement fall into three distinct categories,

> 1st—The movement to the port of export, Port "A"; in this case New Orleans.
>
> 2nd—The movement by steamer to ultimate foreign destination, Port "B"; in this case Aguadilla, and

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3rd—The handling after arrival at the port of export.

It was realized by the Interstate Commerce Commission, just as it was realized by the shipper and the railroad company in the present case, that the goods would be held for appreciable periods at the port of export and that, therefore, it would not be just that the responsibility of the railroad with regard to the goods at the port of export while awaiting arrival of the steamer into which they were there to be loaded, should continue to be that of a common carrier, but rather should become that of a warehouseman.

The three provisions of the bill of lading referred to above are clearly designed to have this effect and do have this effect. With regard to one of these clauses, Section 5, Paragraph 1, the Interstate Commerce Commission in Bills of Lading, 52 I. C. C. 671, pointed out at page 734 that the through export bill is a several, not a joint, contract on the part of the participating carriers for through transportation and that the contention urged by various shippers that there could be no period of time during which both the inland and the ocean carrier might be divested of liability other than that of a warehouseman was incorrect.

In a situation almost identical with the present the Supreme Court of Wisconsin held the liability of the rail carrier for destruction of goods in its possession while awaiting transhipment to be that of a warehouseman. *Courteon v. Kanawha Dispatch Co.*, 110 Wisconsin 610, 86 N. W. 176.

Immediately on the arrival of the shipments in New Orleans on January 26, 1941, the railroad company notified Waterman Steamship Line in writing of the arrival of each of the said shipments. It is submitted that as a practical proposition there was nothing more the railroad could have done to bring the bill of lading provisions into play. At page 10 of its opinion, the Supreme Court of Louisiana ex-

pressed the view that the railroad's liability as a common carrier would not cease until it had given notice of the arrival of the property at the port of export and had also completed its undertaking with respect to the delivery of the property at shipside or had made a tender of its delivery to the party entitled to receive it.

According to the Supreme Court of Louisiana, the performance of these conditions by the railroad, being a prerequisite to the running of the seven days free time, at the expiration of which the railroad's liability would be reduced to that of warehouseman, it followed from the finding that the arrival of the goods at New Orleans, notice of their arrival to the steamship line and their placement in the railroad warehouse did not constitute proper notice and placement for delivery or tender that there could be no reduction of the railroad's liability from that of insurer. The practical effect of this theory would be to make it impossible for a railroad to reduce its liability with respect to goods held at the port of export from that of a common carrier to that of a warehouseman.

The essential consequence of the Court's holding is that it would only be through physical delivery at the steamship wharf that the railroad's liability as a common carrier would cease. Considering that quite regardless of the bill of lading provisions the railroad's liability of any sort would cease when it made delivery to the steamship line, the Louisiana court's theory precludes the possibility of any reduction of the railroad's liability to that of a common carrier so long as it retains posession of the goods. It is only while the railroad has possession of the goods that it could have any interest in having its liability converted to that of a warehouseman. As to any possible suggestion that the theory of the Louisiana Court would be satisfied

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by a physical tender of the goods at the wharf, it is pointed out in the first place that the Louisiana Court had in mind only a tender made at shipside (Opinion page 9)—an impossibility prior to the arrival of the steamer, and that in any event, to haul goods to a wharf and make a tender of delivery to a steamer not yet in New Orleans would have been a futile gesture and a wasteful economic burden not contemplated by any reasonable interpretation of the provisions of the bill of lading on which reliance is placed.

It is submitted that the proper solution of this question is of enormous interest to the railroads and owners of freight moving from inland points in the United States to points outside of the United States. Fire losses are only too common and when they occur the destruction runs into great values. In conclusion, it is submitted, therefore, that the issue is one of serious moment, not only as a pure legal proposition, but also as a matter of substantial economic importance. The peculiar propriety of this Court's ruling on controversies as to whether a railroad's liability is that of a common carrier or that of a warehouseman is shown by the case of *Cleveland, Cincinnati, Chicago & St. Louis Railway Company* v. *Dettlebach*, 239 U. S. 588, wherein it recognized the federal nature of the question of interpretation of the bill of lading provisions reducing the railroad's liability to that of warehouseman.

If the bill of lading provisions are to be interpreted so as to have an effect entirely different from the intention of the Interstate Commerce Commission in prescribing them, there should be a distinct statement of the Supreme Court of the United States to that effect, so that consideration may be given to the desirability of having the bill of lading provisions revised.

VII. It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Section 237(a) of the Judicial Code, as amended.

(Signed) HARRY MCCALL,
Attorney for Texas and New Orleans Railroad Company,
724 Whitney Building,
New Orleans 12, La.

New Orleans, La., June 26, 1947.

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APPENDIX "A"

Opinion Rendered—Monday May 26, 1947

SUPREME COURT OF LOUISIANA

No. 38,345

V. Rivera S. en C.

v.

Texas and New Orleans Railroad Company, et al.

Appeal from Division "A" of the Civil District Court, Parish of Orleans; Hon. Paul E. Chasez, Judge

Fournet, *Justice:*

The plaintiff, Valentin Rivera, is appealing from a judgment of the lower court dismissing his suit to recover the value of a shipment of rice purchased from Dal-Gar Rice Mill, Inc., of Crowley, Louisiana, and destroyed by fire in New Orleans while in transit to Puerto Rico under through export bills of lading issued by the agent of the Texas and New Orleans Railroad Company in Crowley.

The Dal-Gar Rice Mill, Inc., on January 25, 1941, delivered to the Texas and New Orleans Railroad Company, freight prepaid, 600 pockets of Choice Blue Rose Milled Rice Coated, each pocket containing approximately 100 pounds, for through shipment and delivery to the order of Dal-Gar Rice Mill, Inc. (Notify V. Rivera S. en C.), at Aguadilla, Puerto Rico, via the railroad's line to New Orleans and from thence by Waterman Steamship Line to Aguadilla, 200 pockets being marked for shipment by the steamer Kofresi sailing on March 14, 1941, 200 pockets for shipment on the steamer Afoundria sailing on March 28, 1941, and the remaining 200 pockets for shipment by the steamer Maiden Creek scheduled to sail on April 11, 1941. The railroad accordingly issued its three through export bills of lading to cover the three shipments. These consignments reached New Orleans on January 26, 1941, and the following day, during the course of their through tran-

sit, were removed from the freight car in which they had been shipped and were stored by the railroad in its freight depot, a warehouse (leased in part to the Bienville Warehouse Corporation, a subsidiary of the railroad) at Bienville street and the river. Notice of the arrival of the consignments in New Orleans was addressed to the Waterman Steamship Company on January 26, 1941, and was received by that company in due course. No notice of the arrival of the rice in New Orleans was given to either the plaintiff or the Dal-Gar Rice Mill, Inc., and the steamship company was not apprised in its notice just where the rice had been placed. On March 11, 1941, the steamship company mailed to the railroad a written request for the delivery to the vessel of the consignment to be shipped via its steamer Kofresi, scheduled to berth at the foot of Cleste and Market Streets, some two miles from the warehouse, and to sail on March 14. These instructions for the delivery of the rice to the vessel were received by the railroad on the following day. At eight o'clock that night the warehouse in which the rice was stored caught fire and certain of its contents, including these consignments of rice, were completely destroyed.

During the course of the shipment and prior to its destruction, the plaintiff, a wholesale grocer doing business at Aguadilla under the firm name of V. Rivera S. en C., by acquiring the three bills of lading, became the owner of the rice and, after due demand, instituted this suit to recover the value thereof from the railroad and the warehouse corporation, in solido, as common carriers; in the alternative as warehousemen.

The railroad concedes that the foregoing facts are substantially correct but contends that under the terms and conditions of the bills of lading, which together with the applicable tariffs and classifications lawfully on file with the Interstate Commerce Commission constitute the contract between the parties, and more particularly under those provisions thereof contained in sub-divisions 1(b), 5(a), and 10(a) of Part I, when notice of arrival of the shipment in New Orleans was mailed to the steamship company (the connecting carrier) on January 26, 1941, its relationship to the

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shipper ceased to be that of a common carrier and became that of a warehouseman only. It denied liability in that capacity because of lack of negligence on its part in causing the fire but admitted in brief that since the rice was stored in its own warehouse and was under its exclusive supervision and control and not that of a warehouse corporation, it was solely responsible for the loss if found to be liable as a warehouseman.

In a separate answer the Bienville Warehouse Corporation denied any and all liability.

While a bill of lading is generally understood to be a written acknowledgment of the receipt of goods and the contract in which is contained the agreement for their carriage and delivery at a specified time to a designated person or his order, one of its most important functions is "to give formal expression to the stipulations and conditions under which the carrier seeks to obtain a modification or limitation of the liability that otherwise would be imposed upon it under the common law." In the Matter of Bills of Lading, 52 I. C. C. 671, 681.

In order to properly evaluate these modifications, it is necessary that a brief statement be given of the development under the common law and in this country of the liability of common carriers.

The common law liability of carriers was laid down in England as long ago as 1703 by Lord Holt in the famous case of Coggs v. Bernard, 2 Lord Raymond 909, wherein he said that where "a delivery to carry" is made "to one that exercises a public employment * * * and he is to have a reward * * * The law charges this person thus intrusted to carry goods, against all events, but acts of God, and of the enemies of the King."

As commerce moved forward on rapid strides and the importance of the carrier's role became increasingly apparent, the carriers, alarmed at the degree of liability imposed upon them in the transportation of commodities, began to cast about for means of escaping its all-inclusiveness and to contrive ways of diminishing it. The English courts early gave recognition to the right of the carriers to restrict their common law liability, even sanctioning the very simple

expedient devised by them of posting notices in conspicuous places informing the public of the limitations they intended to place upon this liability. The apparent evils that inevitably grew up around such a practice resulted in a Parliamentary enactment in 1854 providing that the common law liability of carriers could only be limited by a specific contract with the shipper.

In this country, the mere posting of notices of limitation of liability by the carriers was never sanctioned, although the rule was early established that such limitations could be effected by the establishment of the contractual relationship between the carrier and the shipper. These contracts have evolved into the bills of lading that form so important a part of the every-day commerce of modern times and they serve three distinct functions: (1) A receipt for the goods; (2) the contract under which the goods is carried; and (3) documentary evidence of title to the goods.

Despite the fact, however, that carriers were permitted to limit or restrict, or even to extend and enlarge, their common law liability, so much confusion arose in this country because of the varied enactments in the different states touching on this matter and the diversity of the construction placed on these enactments by the states and the federal courts that Congress, around the turn of the century, stepped in to correct the situation under its authority to regulate commerce by adopting the Carmack amendment in 1906. In this amendment it was provided that common carriers receiving property for transportation from a point in one state to a point in another would be liable for any loss, damage, or injury to such property caused by it or by any other carrier to which the goods was turned over, any provision to the contrary in receipts, contracts, rules or regulations notwithstanding. The effect of this amendment was to hold the initial carrier liable as having contracted for through carriage to the point of destination, using the lines of the connecting carriers as its agents, and its purpose was to circumvent the usual provisions incorporated in bills of lading limiting the carrier's liability to loss or damage occurring on its own line. The shipping public was thus relieved of the burden of proving upon whose line

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the loss or damage occurred, pratically an impossibility in many instances.

In 1915 Congress enacted the first Cummins amendment, extending the provisions of the Carmack amendment to the transportation of goods within the territories of the United States, the District of Columbia, and goods exported to adjacent foreign countries. This amendment also invalidated all limitations or attempted limitations of the carrier's liability for loss, damage, or injury to goods by making the carrier liable for the *full actual* loss, damage, or injury caused by it or by any of the connecting carriers, irrespective of any contractual provisions that such loss would be restricted to the *asserted value.*

The following year the second Cummins amendment was enacted permitting the carrier to limit its liability to the stated value of all property except ordinary livestock and that property requiring the establishment of particular rates dependent upon the agreed value. This meant that the first Cummins amendment was still applicable to livestock and to those particular classes of property requiring special rates and that as to them carriers still could not limit their liability to less than the full actual value.

It is obvious, therefore, that there has really been very little relaxation of the common law rule or of the strict accountability to which the carrier of goods was held under the common law and that even today the carrier is considered to be the insurer of the goods intrusted to its care and custody for transportation and is, thus, liable for all loss, damage, or injury to such goods while they remain in its possession in its capacity as a common carrier.

The question that has given rise to the greatest number of disputes between carriers and shippers and that has been the most prolific of litigations is the one requiring the determination of just when the carrier ceases to hold goods as a common carrier although it is still in its possession. In other words, just when does the carrier's extraordinary liability and obligation as an insurer of the goods cease and that of a warehouseman only begin?

This question, according to the accepted rule, can only be determined by applying the contractual provisions in

the bill of lading under which the goods were shipped to the facts and circumstances of the case.

Each of the bills of lading in this case is labeled "UNIFORM THROUGH EXPORT BILL OF LADING (Prescribed in Interstate Commerce Commission Orders * * * in Docket No. 4844)" It is specified on their face that the property described therein is "To be carried to the port (A) of New Orleans, La. and thence by Waterman SS Line to the port (B) Aguadilla, P. R." and is there to be delivered in like good order and condition as it was received by the carrier. The fixed and separate rates for the inland carriage and the ocean or on-carrying transportation is also specified. Following this is the provision: "In consideration of the rate of freight herein named (that of the inland carrier is fixed at .14½¢ per one hundred pounds gross weight and that of the on-carrier at .33¢) it is hereby stipulated that the service to be performed hereunder shall be subject to the contract terms and conditions, whether printed or written, herein contained, and said terms and conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns." (Brackets ours.)

Immediately following is the heading "CONTRACT TERMS AND CONDITIONS," under which the bills are divided into three parts. Part I deals with the service to be furnished until delivery at Port A (New Orleans). Part II deals with the service after delivery at Port A and until delivery at Port B (Aguadilla, Puerto Rico). Part III has reference to the service to be furnished after delivery at Port B and until delivery at the ultimate destination. Obviously the only part of the bills with which we are here concerned is Part I.

The very first stipulation to be found under Part I contains the provision that "*The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto except as hereinafter provided.*" (Italics ours.)

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The other provisions under Part I that are pertinent to a decision in this case are as follows:

"1(b) * * * The carrier's liability shall be that of a warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at the port of export, or tender of delivery of the property to the party entitled to receive it, has been made * * *."

5(a) Property not removed by the exporting carrier, or the party entitled to receive it, within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at port (A) has been duly sent or given, and after placement of the property for delivery at port (A), or tender of the property for delivery upon order of the party entitled to receive it has been made, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to the carrier's responsibility as a warehouseman, only, or, at the option of the carrier, may be removed to and stored in a public or licensed warehouse at port (A), or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

"10(a) No carrier shall be liable for delay not occurrring on its own line, or not the result of its negligence, nor in any respect other than as warehouseman, while the property awaits further conveyance and after proper tender of delivery to the next connecting carrier has been made, and if the whole or any part of the property specified herein be prevented by any cause from going from the port of export in the vessel for which intended, the carrier hereunder then in possession is at liberty to forward said prop-

erty by another vessel of the ocean carrier, or, if deemed necessary, by any other vessel, dispatching notice thereof to the shipper and consignee."

"(b) *It shall be the duty of the carrier by railroad to deliver such property to the vessel as a part of its undertaking as a common carrier.*" (Italics ours.)

It therefore follows that under the express law and the terms of the contract the defendant railroad is liable as a common carrier for the loss of the property here involved unless its liability as such has ceased and it has become liable, as contended by the railroad, as a warehouseman only under the conditions stipulated in sub-divisions 1(b), 5(a), and 10(a).

All bills of lading, being the contract between the parties, are subject to the rules governing the interpretation of contracts, and consideration must, therefore, be given to the entire context of the instrument rather than to a single phrase or clause, and all of these clauses are interpreted the one by the other, giving to each the sense that results from the whole. See, Articles 1945-1962 of the Revised Civil Code.

In order to fully understand and determine the meaning of the provisions contained in sub-divisions 1(b), 5(a), and 10(a) of Part I of these bills of lading, they must be read in connection with the other provisions of the contract, as well as with the applicable tariffs and classifications on file with the Interstate Commerce Commission.

In I. C. C. Order No. La.-292, dealing with the demurrage, storage, and handling charges that are applicable in this case, it is stipulated that the free time allowed in New Orleans consists of 168 hours, or 7 days. The freight tariff under which the rice moved (I. C. C. No. La.-274, Supplement 8) contains the provision that "rates published in this Tariff apply to shipside, that is, such rates include handling (unloading) from cars to docks or wharves * * * also switching charges * * * to docks or wharves from terminals of inbound line haul carrier." The term "*shipside*" is defined in I. C. C. Order No. La. 292 to mean "*the placement for delivery to* or receipt from *ships*, barges or other

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water craft, according to the customs or practices of the port." The local terminal charges tariff of the railroad, containing the rates, rules, and regulations governing switching, drayage, and handling (I. C. C. No. La.-287) contains the provision in Item No. 840 that "In the absence of specific export rates * * * to New Orleans * * * the domestic rates to the ports named * * * will apply to shipside and include the cost of making such delivery on export traffic to * * * Porto Rico * * * from * * * Louisiana (West of the Mississippi River)." In sub-division (b) of this item we find the provision: "In the absence of rates specifically published to shipside, New Orleans * * * rates published by the Southern Pacific Lines (this includes the defendant railroad) * * * to New Orleans * * * will include all charges * * * in movement of and delivery to shipside at New Orleans * * * on export traffic to * * * Porto Rico." In Item No. 910 is contained the further provision that "Shippers or their agents will not be permitted to perform services of loading or unloading on shipments covered by through * * * export bills of lading." See, also, page 5 of I. C. C. Order No. La.-292 to this same effect. (Italics and brackets are ours.)

Simply stated, these provisions in the bills of lading — when considered with the object of the contract, the provisions of clause 10(b) above quoted that "It shall be the duty of the *carrier by railroad* to deliver such property to the vessel as a part of its undertaking as a common carrier," and the applicable tariffs and classifications which form a part of these bills of lading —— declare that the liability of the railroad as a common carrier shall cease when the railroad has completed its undertaking under these bills and tariffs, that is, when it has given due notice of the arrival of the property at the port of export and has also completed its undertaking with respect to the delivery of this property at shipside or has made a tender of its delivery to the party entitled to receive it. It is only then that the free time provided for in the tariffs (seven days) begins to run and it is only at the expiration of this free time, if the on-carrying carrier has failed or refused to take the delivery thus tendered, that the inland carrier's lia-

bility becomes that of a warehouseman under Section 1(b) of Part I of the bills of lading. If the property is not removed by the exporting carrier within this free time, then the provisions of sub-division 5(a) of Part I become operative and the railroad is given the choice under this clause of storing the property itself (subject to the tariff charges for storage) and holding it as a warehouseman only, or of removing it to a public or licensed warehouse at Port A and there having it stored at the owner's expense and freeing itself of any liability whatsoever (even as a warehouseman). The provisions found in clause 10(a) do not add anything to these other two provisions. This clause simply complements the other two by according to the carrier, in the event the property is prevented from leaving the port on the vessel intended, the right of either forwarding it on another vessel of the same ocean carrier or of forwarding it by any other available vessel, with due notification of such shipment to the shipper and the consignee.

That the construction we have thus put on these clauses reflects the true intent of the parties in this case is, in our opinion, eloquently demonstrated by the reasons assigned by the Interstate Commerce Commission in refusing to recommend the form suggested by the carriers themselves and in recommending, instead, a clause indentical with that found in sub-division 1(b) of Part I of these bills of lading, which reasons are, in part, as follows: "As a practical matter,it is not only essential that the shipper should have notice of the arrival of his goods, but that the carrier should place them in an accessible position to be received by him and removed. Until they are so placed and tendered for delivery it is obviously impossible for the consignee to receive and remove them *and the carrier can not reasonably be relieved of its common-law liability until it has so placed or tendered the goods for delivery.* If the consignee, or other party upon whom is the duty to receive the goods, does not remove them within a reasonable time thereafter, the carrier's common-law liability should cease and become that of a warehouseman only. The consignee should have a reasonable time within which to remove the goods after notice has been duly received or given that they are *ready for delivery,* and *the carrier's notice to the shipper should be*

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one which not only notifies him of the arrival of the goods, but also that they are ready for delivery * * *." The Commission therefore concluded that "The consignee is within his legal rights if he avails himself of *the full time allowed by the tariffs* (free time) and the carrier can not be presumed to be released from its liability, as such, while the goods are continued in its custody and the shipper, in accordance with the privileges specifically accorded under duly published and filed tariffs, incurs no penalties." (Brackets and italics ours) 52 I. C. C. 671.

In other words, as simply stated by Dobie in his authoritative work on Bailments and Carriers, "When goods are received by a carrier to be transported to a point beyond its own line, under circumstances which * * * make the initial carrier liable as an insurer only to the end of its own line, there is nevertheless superadded to its duty as a common carrier over its own line that of delivering the goods safely to the connecting carrier. This duty on the part of the initial carrier is an obligation implied in receiving the goods consigned to a point beyond its own line. Until this duty is performed, the first carrier continued liable as an insurer. The delivery to the connecting carrier, too, must be an actual delivery, or acts which are so far equivalent to a delivery as to make the next line assume the relation of a carrier to the goods. The first carrier does not, by unloading the goods at the end of its line, become a mere warehouseman. The shipper who delivers his goods to a common carrier has a right to understand that the liability of an insurer is upon some carrier during the whole period of the transit. The duty of one carrier is not discharged, therefore, until it has been imposed upon the succeeding carrier, and this is not done until there is an actual delivery of the goods, or at least such acts as are in law equivalent to a tender of delivery.

"The owner loses sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination. At each successive point of transfer from one carrier to another, the goods are liable to be placed in warehouses, and during this storage the danger of injury to, or loss of, the goods, either from

collusion of the carrier or other cause, is equally as great as while the goods are actually in transit. Again, the storing of the goods under such circumstances is to be regarded solely as an incident of, and accessory to, their actual transportation." Section 145 pages 447-449.

It is our opinion, therefore, that the arrival of the rice in New Orleans, notice of such arrival to the Waterman Steamship Line, and the placement of this rice in its warehouse by the defendant railroad did not constitute the notice and placement for delivery or tender contemplated by clause 1(b) of Part I of the bills of lading—clauses 5(a) and 10(a) having no application here—under which they were transported to operate as a release of the carrier's common law liability as insurer of the goods. The carrier is, therefore, liable to the plaintiff for the loss here complained of.

The case of Courteen *v.* Kanawha Dispatch, 110 Wis. 610, 86 N. W. 176, decided by the Supreme Court of Wisconsin in 1910, and relied on by the defendant railroad, is not applicable to this case from a factual standpoint and is not pertinent from a legal standpoint. In that case the court remarked: "The defendant also admits that it had charge of this property, and had not fully performed its contract; that it remained for it, upon arrival of the steamship, to make delivery of the goods. *Under this concession, unless the common-law liability has been modified by the contract, the defendant would be liable for the loss by fire.*" The Court said, however: "In the bill of lading there was an express stipulation against such liability," and concluded that since such exemption from liability was valid under the law of Wisconsin, there could be no liability unless the loss occurred because of the carrier's negligence, which it found was not the case . (Italics ours.)

The railroad's counsel in their argument on appeal here both orally and in brief have raised the question of the right of the plaintiff to prosecute this suit because it received the full value of the alleged loss from the Norwich Union Fire Insurance Society, Ltd., though an effort was made by the plaintiff to convert the transaction from a pure payment of insurance under the policy to a loan.

This question is apparently being raised for the first

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time on appeal for we fail to find that such an issue was specially pleaded in the lower court. However, even if it may be said that it was pleaded specially or that the pleadings were enlarged because of the introduction of evidence on the subject, similar arrangements between the insured and the insurer have been upheld by the Supreme Court of the United States. See, *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, 39 S. Ct. 53, 65 L. Ed. 170.

In disposing of the identical issue raised here, Justice Brandeis, as the organ of the court in that case, said:

"Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent (less expenses) that, recovery is had, the insurers will receive payment or be reimbursed, for their so-called loans to the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies.

"Agreements of this nature have been a common practice in business for many years. * * * It is clear that if valid and enforced according to their terms, they accomplish the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which, by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms of a loan, *is in substance a payment of insurance;* that to treat it as if it were a loan is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying its effect. The

shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right of subrogation against the insurers. * * * The insurer could not have been obliged to pay until the condition of their liability, i. e., non-liability of the carrier, had been established. The shipper could not have been obliged to surrender to the insurers the conduct of the litigation against the carrier until the insurers had paid. In consideration of securing them the right to conduct the litigation, the insurers made the advances. It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice." See, also, Dejean *v.* Louisiana Western R. Co., 167 La. 111, 118 So. 822. (Italics ours.)

While the plaintiff in a supplemental petition sought to recover $2,838, the value of the rice lost in accordance with its market value at Aguadilla, Puerto Rico, on the approximate date such shipment would have arrived there had it not been destroyed, he now concedes, as he must under the jurisprudence, that he is entitled to recover only the amount of $2,550, the price at which the rice could have been replaced in New Orleans at the time of its destruction. This is the amount he prayed for in his original petition. Since the defendant failed to adjust and pay the plaintiff's claim within 30 days after it was filed with the railroad on April 17, 1941, however, the plaintiff is entitled to recover, under the provisions of Act 29 of 1908, legal interest at the rate of 5% per annum on this amount from the date of such claim, plus the penalty of $50 on each of these three shipments, as provided in the act.

We think, too, that the plaintiff is entitled to recover its claim for $198.99, representing the prepaid freight collected by the railroad for the transportation of this rice from the port of New Orleans to Aguadilla, Puerto Rico, with legal interest from the date of demand.

For the reasons assigned the judgment of the lower court is annulled and set aside and it is now ordered, adjudged,

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and decreed that there be judgment in favor of the plaintiff, Valentin Rivera, and against the defendant Texas and New Orleans Railroad Company in the sum of $2,748.99, with 5% per annum interest from April 17, 1941, until paid, and for the additional sum of $150. All costs of this suit are to be paid by the defendant railroad.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 197

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Appellant,

versus

V. RIVERA S. en C.,
Appellee.

Appeal From the Supreme Court of Louisiana.

BRIEF ON BEHALF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, APPELLANT, IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

HARRY McCALL,
Attorney for Texas and New Orleans Railroad Company,
724 Whitney Building,
New Orleans 12, Louisiana.

New Orleans, La.
July 12, 1947

SUBJECT INDEX AND TABLE OF CASES.

Subject Index.

	PAGE
BASIS OF JURISDICTION	1
STATEMENT OF CASE	2
SPECIFICATION OF ERRORS	3
ARGUMENT	5
The State Penalty Statute	5
The Warehouseman Issue	13

Table of Cases, etc.

United States Constitution, Article I, Section 8	6
Judicial Code:	
Section 237 (a)	23
Section 237 (b)	23
Section 237 (c)	24
Louisiana Act 29 of 1908	4, 12
Interstate Commerce Act:	
Section 1 (6)	6, 18
Section 12 (1)	6, 18
Section 13 (4)	12
Section 15 (1)	6, 18
Section 20 (5)	6, 18

Table of Cases, etc.—(Continued)

	PAGE
Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122	11
Export Bill of Lading. In the Matter of Bills of Lading, 64 I. C. C. 347	7, 11, 17
Charleston & Western Carolina Ry. Company v. Varnville Furniture Company, 237 U. S. 597	7
Missouri, Kansas & Texas Railway Company of Texas v. Harris, 234 U. S. 412	11
Missouri Pacific R. Co. v. Porter, 273 U. S. 341	8
Pennsylvania Railroad Company v. Public Utilities Commission of Ohio, 298 U. S. 170	7
Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U. S. 498	7
Texas and Pacific Railway Company v. Railroad Commission of Louisiana, 183 Federal 1005, 1007	7

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I.

BASIS OF JURISDICTION.

This appeal taken under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344 (a)) from a final judgment of the Supreme Court of Louisiana entered May 26, 1947 (not yet reported),

is predicated on two assigned errors made by that Court, each of which is believed to present a substantial Federal question.

II.

STATEMENT OF CASE.

This suit was originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana (Opinion, p. 1). The plaintiff was V. Rivera S. en C.; the defendants were Texas and New Orleans Railroad Company and Bienville Warehouses Corporation. The suit grew out of three shipments of rice from Crowley, Louisiana, under through export bills of lading issued by defendant Railroad as initial carrier (Opinion, pp.1-2). The Bills of lading, each dated January 25, 1941, provided that the rice would move from Crowley to New Orleans, Louisiana, by defendant's railroad, and thence by steamers of the Waterman Steamship Corporation to Aguadilla, Porto Rico, the ultimate destination (Opinion, p. 6). On each bill of lading was shown the name of the steamer (and its expected sailing date) by which the rice was to go forward from New Orleans (Opinion, pp. 1-2). Each sailing date was subsequent to March 12, 1941 (Opinion, p. 2). The shipments arrived in New Orleans January 26, 1941, the Waterman Steamship Corporation was notified thereof and rice was unloaded into the Railroad's depot (Opinion, p. 2). The depot and the contents thereof, including the rice, were burned on March 12, 1941 (Opinion, p. 2). Plaintiff, as owner of the rice, brought the suit for its value, plus certain penalties (Opinion, p. 2). The contention of the Rail-

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road was that at the time of the fire its relationship to the goods was that of a warehouseman and not a common carrier, and that it was not guilty of negligence in the premises (Opinion, p. 3).

The Trial Court held against plaintiff, dismissing his suit. On appeal to the Supreme Court of Louisiana, that Court reversed the judgment and on May 26, 1947, entered judgment in favor of plaintiff and against the Railroad Company for the amount claimed, plus penalties, but affirmed as to the Warehouses Corporation (Opinion, p. 16). Neither the Railroad Company nor plaintiff, by application for rehearing or otherwise, questioned the propriety of the judgment of affirmance as to the Warehouses Corporation. The Supreme Court's holding against the Railroad Company was based not on a finding of negligence, but on the conclusion of law that its relationship to the goods at the time of the fire was that of a common carrier, and not that of a warehouseman. Application for rehearing by the Railroad Company was denied June 16, 1947. The Chief Justice of the State Supreme Court, on June 17, 1947, entered an order allowing the present appeal.

III.

SPECIFICATION OF ERRORS.

The first error relied on is that the Louisiana Court held the Appellant liable for three penalties of $50.00 each for failure to pay within 30 days, after the filing thereof, claims for loss of property or freight in accordance with

Louisiana *Act 29 of 1908*,* billed from Crowley, Louisiana, to Aguadilla, Porto Rico, under through export bills of lading in form prescribed by the Interstate Commerce Commission, the loss complained of occurring while the said shipments were being held by Appellant in warehouse at New Orleans, Louisiana, awaiting arrival of the steamers on which the shipments were to go to ultimate destination. This holding by the State Court sustaining the constitutionality of the said State statute was made adversely to Appellant's contention that the Louisiana statute, if applied to the shipments in question, would be violative of and repugnant to the Commerce Clause of the Constitution of the United States.

---

*"AN ACT To regulate the manner in which common carriers doing business in this State shall adjust claims for loss of or damage to freight and providing penalties for failure to settle same within time prescribed and for collection thereof.

Section 1. Be it enacted by the General Assembly of the State of Louisiana that every claim for loss of or damage to property or freight while in the possession of any common carrier doing business in this State shall be adjusted and paid within thirty (30) days in case of shipments wholly within the State and within sixty (60) days in case of shipments from without the State after the filing of such claim with the agent of such common carrier at the point of destination of such shipment provided that no such claim shall be filed until after the arrival of the shipment or some part thereof at the point of destination or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage together with legal interest thereon from the date of the filing of the claim therefor until the payment thereof.

Section 2. Be it further enacted, etc., That in case of failure of such common carrier to adjust and pay such claim within the periods respectively herein prescribed such failure shall subject such common carrier so failing to a penalty of Fifty (50) Dollars for each and every failure to be recovered by any consignee or consignees aggrieved in any Court of competent jurisdiction; provided that unless said consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of loss or damage with legal interest as aforesaid; provided, further that no common carrier shall be liable under this Act for freight or property which never came into its possession.

Section 3. Be it further enacted, etc., That this Act shall go into effect from date of its promulgation, and that all laws or parts of laws in conflict therewith be and the same are hereby repealed."

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The other error of which we complain is that the State Court held, as a matter of law, that when the said shipments were destroyed by fire in New Orleans, on March 12, 1941, Appellant's relation to them was that of a common carrier and not a warehouseman, and that therefore Appellant was liable without a finding of negligence.

Appellee has moved to dismiss or affirm the present appeal; and in answering the contentions urged in support of such motion, we shall deal with the two points in the order above stated.

IV.

ARGUMENT.

(a) The State Penalty Statute.

At the beginning of their motion to dismiss or affirm counsel say that Appellee has waived the penalties and has entered a remittitur in regard thereto in the State Court. It is true that a motion for a remittitur was filed, but the order thereon was not signed by the Chief Justice of the said Court. Obviously the order could not have been signed because the State Court no longer had jurisdiction for two reasons (a) that the judgment of the State Court was entered May 26, 1947, application for rehearing was denied June 16, 1947, at which time the judgment became final, and the remittitur motion was not filed or presented until June 27, 1947, and (b) any jurisdiction the Louisiana Court might have had was clearly lost when the Chief Justice, on June 17, 1947, signed the order allowing this appeal.

Accordingly, the penalties still remain included in the judgment.

That the allowance of said penalties violated the Commerce Clause of the Federal Constitution is demonstrated in the following manner:

Under the Commerce Clause *(Article I, Section 8 of the Constitution)* "The Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States * * *". The power so given to Congress was exercised by the passage of the *Interstate Commerce Act* (Act of February 4, 1887, 24 Stat. L. 379, 49 U. S. C.) and various amendments thereto. *Section 1 (6)* of the said Act requires all common carriers to

> "* * * establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * the issuance, form and substance of * * * bills of lading * * *."

By *Section 12 (1)* of the Act the Interstate Commerce Commission is required, *inter alia*, to "enforce the provisions of this Chapter". Under *Section 15 (1)* of the Act the Commission is empowered

> "* * * to determine and prescribe what * * * practice is or will be just, fair, and reasonable, to be thereafter followed * * *."

Also it is provided by *Section 20 (5)* of the Act that

> "The commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by carriers * * * including the accounts, records, and memoranda of the movement of traffic * * *."

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Pursuant to the powers thus given to it, the Commission prescribed the form and conditions of various types of bills of lading. In *"Export Bill of Lading. In the Matter of Bills of Lading"*, 64 I. C. C. 347, the Commission dealt with the particular type of bill of lading and prescribed the uniform bill of lading with which we are concerned. The precise form prescribed is set out in Appendix D, facing page 356. This form is, so far as any clauses relevant to this controversy are concerned, the form used in connection with the shipments involved in this suit.

Section 3 (b) of Part I of the bills of lading provided that:

> "The amount of any loss or damage, including loss or damage arising from delay for which any carrier is liable, shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment under this bill of lading * * *."

That the Interstate Commerce Act applies to shipments under through export bills of lading on the movement from the point of origin within a state to the port of export within the same state has repeatedly been held. *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498; *Pennsylvania Railroad Company v. Public Utilities Commission of Ohio*, 298 U. S. 170; *Texas and Pacific Railway Company v. Railroad Commission of Louisiana*, 183 Federal 1005, 1007.

In holding unconstitutional an almost identical statute of South Carolina in *Charleston & Western Carolina Rail-*

way Company v. Varnville Furniture Company, 237 U. S. 597, this Court said at page 604:

> "It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. Southern Ry. v. Reid, 222 U. S. 424, 443. But that is immaterial. **When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.** Chicago, Rock Island & Pacific Ry. v. Hardwick Elevator Co., 226 U. S. 426, 435. Southern Railway v. Indiana Railroad Commission, 236 U. S. 439, 446, 447. The legislation is not saved by calling it an exercise of the police power, or by the proviso in the Carmack Amendment saving the rights of holders of bills of lading under existing law. Adams Express Co. v. Croninger, 226 U. S. 491, 506, 507." (Emphasis ours.)

While *Missouri Pacific Railroad Company v. Porter*, 273 U. S. 341, did not involve consideration of a state penalty statute, but the applicability of a state statute under which a bill of lading provision as to non-liability for destruction by fire would have been invalid, which statute this Court held unconstitutional, much that is said in the opinion in that case is applicable to the present controversy. We quote from pages 343-4 as follows:

> "The power of Congress under the commerce clause to regulate bills of lading in respect of such shipments is not questioned; and, if it has entered the field of such regulation, the state statute is thereby

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superseded. The Interstate Commerce Act extends to the plaintiff in error and to the other railroads named in the bill of lading over which the cotton was to have been transported from Earle, Arkansas, to the port of Brunswick, Georgia, and it also extends to the interstate transportation over the inland route constituting a part of the movement in foreign commerce. §1 (1), (2) and (3), 41 Stat. 474. Among other things, the Act requires all carriers subject to it to establish and enforce just and reasonable regulations affecting the issuance, form and substance of bills of lading. §1 (6). 41 Stat. 475. It directs the Interstate Commerce Commission to keep informed as to the manner and method in which the business of carrier is conducted, and 'to execute and enforce the provisions of' the Act. §12. 25 Stat. 858. It provides that whenever, after hearing, the commission shall be of opinion that any 'regulation or practice whatsoever' of the carriers is unjust or unreasonable it may determine and prescribe what is just, fair and reasonable, and may make an order requiring the carriers to observe the regulation or practice prescribed. §15. 41 Stat. 484. The Act requires a carrier receiving property for transportation from a point in one State to a point in another State or from a point in the United States to a point in an adjacent foreign country to issue bills of lading therefor; and, to some extent, it regulates their provisions affecting the liability of carriers. §20 (11)—Carmack and Cummins Amendments. 38 Stat. 1197."

From the same opinion we quote also from pages 345-6 as follows:

"The question is whether Congress has entered upon the regulation of provisions in bills of lading

affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign vessel for ocean carriage to a non-adjacent foreign country. All of the provisions referred to were in force when the cotton was delivered to plaintiff in error. No Act of Congress or order of the commission prescribed a form of bill of lading for this shipment. Cf. In the Matter of Bills of Lading, 64 I. C. C. 347, et seq.; Alaska S. S. Co. v. United States, 259 Fed. 713; same case, 253 U. S. 113. The defendants in error rightly say that the Carmack Amendment, the Cummins Amendment, or §25 does not apply to such a shipment. But that does not sustain their contention that Congress has not evinced an intention to regulate bills of lading for transportation such as is here involved. Section 1 (6) extends to all carriers and to all transportation subject to the Act; it prescribes a general rule applicable to all regulations and practices affecting the form or substance of bills of lading in order that they may be just and reasonable. And the commission is empowered and directed to enforce the rule.

"The general regulation of the 'issuance, form, and substance' of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in

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> opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction. Napier v. Atlantic Coast Line Ry. Co., 272 U. S. 605; Oregon-Washington Co. v. Washington, 270 U. S. 87, 102; Penna. R. R. Co. v. Pub. Service Comm., 250 U. S. 566; Charleston & Car. R. R. Co. v. Varnville Co., 237 U. S. 597, 604; Adams Express Co. v. Croninger, 226 U. S. 491, 505; Nor. Pac. Ry. v. Washington, 222 U. S. 370, 378; Prigg v. Pennsylvania, 16 Pet. 539, 617, 618; Houston v. Moore, 5 Wheat. 1, 21, 22." (p. 345-6.)

With regard to the statement in the foregoing quotation that

> "No * * * order of the Commission prescribed a form of bill of lading for this shipment"

we call attention to the fact that the shipment was made October 21, 1920, whereas the Commission's order prescribing the form of through export bills of lading was not entered until exactly one year later. *Export Bill of Lading, In the Matter of Bills of Lading*, 64 I. C. C. 347.

As to *Atlantic Coast Line Railroad Company v. Mazursky*, 216 U. S. 122 and *Missouri, Kansas & Texas Railway Company of Texas v. Harris*, 234 U. S. 412, the one upholding the validity of a similar penalty statute and the other the validity of a statute assessing attorney's fees, relied on by counsel in his motion to dismiss or affirm, while we would think that the theory underlying these decisions was abandoned in the subsequent *Varnville Furniture* case, they are definitely distinguishable in that they were decided long before the Interstate Commerce

Commission entered orders prescribing forms of bills of lading. Incidentally at pages 417 and 422 of the Harris opinion it was clearly recognized that the power of the State to enact a statute of the type in question could be exercised only so long as the Federal Government did not enter the particular field.

Once the Commission prescribed the form of bill of lading, including a provision as to the basis of recovery (Section 3 (b), Part I) the States were, under the Commerce Clause, barred from further regulation in that regard.

Obviously the effect of the Louisiana Statute is to require, in regard to any claim not paid within the time limit fixed, the payment of $50.00 more than is contemplated by the bill of lading provision. It is further submitted that the effect of such a statute would be to give to shippers in Louisiana an advantage over shippers in any other State where there is no similar statute, which would constitute a violation of the discrimination provisions of *Section 13 (4)* of the Interstate Commerce Act.

That the issue raised is not a trifling technicality but a question of substantial importance to all railroads can not be denied, for it would be present in every claim made under a through export bill of lading in any State having a similar penalty statute, provided the investigation could not be completed within the time limit fixed by the statute, or provided the courts should hold against the carrier.

That Appellee may now be willing to waive the penalties does not protect Appellant, which has against it a

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final judgment of the highest court of the State sustaining the validity of the statute. We are entitled to and we respectfully seek a judgment of this Court reversing the State Court and holding the State statute unconstitutional as applied to the shipments in question.

(b) The Warehouseman Issue.

As found by the State Supreme Court, the facts were:

The shipments were made from Crowley, Louisiana, on January 25, 1941 (Opinion, page 1) and reached New Orleans, Louisiana, on January 26, 1941 (Opinion, page 2). On the following day they were unloaded from the cars into the railroad's freight depot and were there stored (Opinion, page 2). Notice of arrival of shipments in New Orleans was addressed to Waterman Steamship Company on January 26, 1941, and was received by that Company in due course (Opinion, page 2). One of the bills of lading provided that the shipment was to go forward from New Orleans by the Steamer Kofresi, sailing on March 14, 1941, another by the Steamer Afoundria sailing on March 28, 1941, and the third by the Steamer Maiden Creek on April 11, 1941 (Opinion, page 2). On March 11, 1941, the Steamship Company mailed to the railroad company a written request for the delivery to the vessel of the consignment to be shipped via its Steamer Kofresi, scheduled to berth at the foot of Celeste and Market Streets, some two miles from the warehouse and to sail on March 14 (Opinion, page 2). These instructions for the delivery of the rice to the vessel were received by the railroad on the following day (Opinion, page 2). At

eight o'clock that night the warehouse in which the rice was stored caught fire and certain of its contents, including these consignments of rice, were completely destroyed (Opinion, page 2).

Under the applicable tariff the free time allowed in New Orleans was 7 days (Opinion, page 9).

The bill of lading covering each of the shipments was the Uniform Through Export Bill of Lading (Opinion, page 6). Each such bill provided that the property described therein is

> "To be carried to the port (A) of New Orleans, La., and thence by Waterman SS Line to the port (B) Aguadilla, P. R." (Opinion, page 6.)
>
> * * * * * * *
>
> "* * * the bills are divided into three parts. Part I deals with the service to be furnished until delivery at Port A (New Orleans). Part II deals with the service after delivery at Port A and until delivery at Port B (Aguadilla, Puerto Rico). Part III has reference to the service to be furnished after delivery at Port B and until delivery at the ultimate destination. Obviously the only part of the bills with which we are here concerned is Part I." (Opinion, page 7.)

Part I of the bills of lading contains the following pertinent provisions:

> "1 (b) * * * The carrier's liability shall be that of a warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such

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free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at the port of export, or tender of delivery of the property to the party entitled to receive it, has been made * * *."

"5 (a) Property not removed by the exporting carrier, or the party entitled to receive it, within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at port (A) has been duly sent or given, and after placement of the property, for delivery at port (A), or tender of the property for delivery upon order of the party entitled to receive it has been made, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to the carrier's responsibility as a warehouseman, only, or, at the option of the carrier, may be removed to and stored in a public or licensed warehouse at port (A), or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

"10 (a) No carrier shall be liable for delay not occurring on its own line, or not the result of its negligence, nor in any respect other than as warehouseman, while the property awaits further conveyance and after proper tender of delivery to the next connecting carrier has been made, and if the whole or any part of the property specified herein be prevented by any cause from going from the port of export in the vessel for which intended, the carrier here-

under then in possession is at liberty to forward said property by another vessel of the ocean carrier, or, if deemed necessary, by any other vessel, dispatching notice thereof to the shipper and consignee."

"(b) It shall be the duty of the carrier by railroad to deliver such property to the vessel as a part of its undertaking as a common carrier." (Opinion, pages 7-8.)

It was on these facts that the Louisiana Court held that, as a matter of law, Appellant's relationship to the shipments at the time of the fire on March 12, 1941, was that of a common carrier and not, as contended by Appellant, that of a warehouseman, which would have meant that in order to hold it liable negligence would have to be found, and there was no such findings.

The salient portions of the foregoing bill of lading provisions are:

"1 (b) * * * The carrier's liability shall be that of a warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time * * * after notice of the arrival of the property * * * at the port of export * * * has been duly sent * * * and after placement of the property for delivery at the port of export, or tender of delivery of the property to the party entitled to receive it, has been made * * *."

"5 (a) Property not removed by the exporting carrier * * * within the free time allowed * * * after notice of the arrival of the property at port (A) has been duly sent or given, and after placement of the property for delivery at port (A), or tender of the property for delivery upon order of the party en-

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titled to receive it has been made, may be kept in * * * depot * * * subject to * * * the carrier's responsibility as a warehouseman, only * * *."

"10 (a) No carrier shall be liable * * * in any respect other than as warehouseman, while the property awaits further conveyance and after proper tender of delivery to the next connecting carrier has been made * * *."

The form of the bills of lading had been prescribed by the order of the Interstate Commerce Commission in *"Export Bill of Lading, In the Matter of Bills of Lading"*, 64 I. C. C. 347, the precise form of the Uniform Export Bill of Lading being set out in Appendix D, facing page 356. The clauses under consideration in the bills of lading involved in this suit are exactly as prescribed in 64 I. C. C. 347, 356. We mention this because, as a result of subsequent hearings, the Commission prescribed changes in some of the other provisions, chiefly, if not entirely, in Part II of the bill of lading, but certainly none with regard to the three clauses on which we rely.

As pointed out in our argument under our first assignment, in prescribing the form of bills of lading the Commission acted under the authority conferred on it by the Interstate Commerce Act; and in enacting that Act Congress exercised the power vested in it by the Commerce Clause of the Constitution.

The Louisiana Court was put on notice of the bill of lading provisions, the report and order of the Commission prescribing the form thereof, the applicable provisions of

the Interstate Commerce Act (particularly Sections 1 (6), 12 (1), 15 (1) and 20 (5), which are discussed and from which we quote in our argument under our first assignment); and in interpreting these orders of the Commission and these provisions of the Interstate Commerce Act so as to hold Appellant's obligations to be those of a common carrier rather than those of a warehouseman, the Louisiana Court deprived Appellant of the benefit of the said Federal regulations and the Federal statute enacted under the authority given Congress by the Commerce Clause of the Constitution, thus clearly presenting a substantial Federal question for review by this Court.

Referring to Appellant Railroad, the Louisiana Court said at the bottom of page 12 of its opinion that

> "The first carrier does not, by unloading the goods at the end of its line, become a mere warehouseman. The shipper who delivers his goods to a common carrier has a right to understand that the liability of an insurer is upon some carrier during the whole period of the transit."

This concept that "the liability of an insurer is upon some carrier during the whole period of transit" is, we respectfully submit, fundamentally erroneous when applied to the present shipments under the Uniform Export Bills of Lading. Precisely the contrary was recognized as proper by the Commission and precisely the contrary was prescribed by it in the form the Uniform Export Bills of Lading, and particularly by the clauses thereof on which we rely.

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The Louisiana Court's conclusion (Opinion, page 13) that

> "* * * the arrival of the rice in New Orleans, notice of such arrival to the Waterman Steamship Line, and the placement of this rice in its warehouse by the defendant railroad did not constitute the notice and placement for delivery or tender contemplated by clause 1 (b) of Part I of the bills of lading—clauses 5 (a) and 10 (a) having no application here—under which they were transported to operate as a release of the carrier's common law liability as insurer of the goods,"

is, we respectfully submit, wrong in various regards.

We can not understand how the Louisiana Court reached the conclusion that clauses 5 (a) and 10 (a) of the bills of lading have no application here. It is, we submit, clear that the carrier could plead all or any of the said clauses. At the end of the bills of lading we find the following language (prescribed by the Commission):

> "And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder."

Thus clauses 5 (a) and 10 (a) could not be disregarded.

The trouble with the opinion of the Louisiana Court is that it is not realistic in seeking to maintain Appellant's common carrier liability until delivery to the steamer and in expecting Appellant to do something more than was

actually done in order to reduce its liability to that of warehouseman.

It is obvious that a shipment from an inland point to a foreign destination, involving a rail and water movement, is very different from a shipment between two points in this country involving a haul over two or more railroads. In the latter situation when one railroad handles the shipment to the connection with the next railroad, delivery to the second railroad and forwarding by it is a normal routine affair. At all times the railroads are charged with the duty of proceeding with the transportation of the goods to final destination. However, when we deal with an export shipment the rail line can rarely make immediate delivery to the steamship line because such delivery cannot be made until the steamer is in port and ready to take on cargo. Accordingly, at the port of export the railroad has to hold the goods pending their delivery to the steamer. Clearly its duty to take steps to advance the transportation of the goods is suspended until the arrival of the steamer. It would, indeed, be harsh if in this interval of forced inactivity it is to be regarded as a common carrier. Please note that here the three shipments were made on January 25, 1941, under bills of lading that did not contemplate their leaving New Orleans until March 14, March 22 and April 11, respectively. They arrived in New Orleans on January 26th and so had been there a month and a half before March 12, when the fire occurred. The Waterman Line was immediately notified of the arrival in New Orleans of the shipments and they were promptly put on storage in Appellant's depot. That no other action was expected of Appellant by Waterman is

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shown by the fact that just before the fire Waterman requested the delivery to the steamer of the shipment that was expected to go forward on March 14. This request of Waterman's would seem to have been a recognition of clause 5 (a).**

What more was Appellant to do? Surely it was not expected to haul the goods to the wharf and there make a physical tender of delivery. All parties knew that the rice was to go forward by steamers scheduled to sail on dates all subsequent to March 12. The function of a notice of arrival is to advise the receiver that the goods are available to him. To suggest that there should be another document formally advising the receiver that the goods are herewith tendered to him would entail the doing of a vain and useless thing.

That the free time had run long before March 12 is obvious. There was certainly placement in the depot.

As to clause 1 (b) of the bills of lading, there was notice of arrival and placement, and while there need be either placement or tender, and not both, the real practical effect of the notice was to make tender.

Apparently the chief difference in the requirements of 1 (b) and 5 (a) is that in the latter the reduction of lia-

** Parenthetically, we may remark that there is no finding by the Louisiana Court that there was any duty on Appellant to make delivery of this one shipment to the wharf prior to the fire. The decision in no way differentiated this shipment from the other two. Our position was and is that Appellant could not deliver this shipment to the wharf until the Steamer was ready to receive it, and that up to that time its relationship to the shipment continued to be that of a warehouseman.

bility to warehouseman does not occur until after the running of the free time. As that had run, what was said as to 1 (b) applies equally to 5 (a).

In order to reduce its liability to that of warehouseman under 10 (a) all that was required was to make proper tender of delivery to Waterman, the next connecting carrier. It is respectfully submitted that was exactly what the so-called notice of arrival did.

The Louisiana Court was apparently troubled by the fact that on arrival of the steamer appellant was, as to each shipment, charged with the duty of making delivery of the goods at the wharf some two miles from the depot, from which fact it concluded that Appellant had not completed its common carrier obligations and apparently therefore could not become a warehouseman. It is submitted that as a practical matter the goods had to be stored in Appellant's depot, pending the arrival of the steamers, and that during this interval there was no duty on appellant to proceed with the transportation of the goods. In other words during the interval the common carrier obligation was suspended and Appellant's responsibility was reduced to that of warehouseman exactly as contemplated by the bill of lading provisions on which we rely and as intended by the Commission in prescribing those provisions.

In holding Appellant liable as a common carrier, the Louisiana Court committed an error of law clearly presenting a Federal question. That the question is of substance will be appreciated when it is realized that it will

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be presented every time a shipment under the through export bill of lading is damaged or destroyed after arrival at the port of export and before delivery to the steamer.

The bill of lading provisions relied on were specifically pleaded in the original answer of Appellant, and it was specifically pleaded that on March 12, 1941, its responsibility had been reduced to that of Warehouseman. Throughout the litigation these contentions were continuously urged. They were made on brief and in argument in the Trial Court. They were made on brief and in argument before the Louisiana Supreme Court. That Court ruled against these contentions. They were reurged in application for a rehearing and brief in support thereof. In denying such application, the Louisiana Supreme Court has left us no remedy but to appeal to the Supreme Court of the United States for its ruling on the very questions we raised at every possible opportunity throughout the litigation, which questions are indeed the fundamental issues in this suit.

If the provisions of the bills of lading relied on are subject to the interpretation put on them by the Louisiana Court then and in that event it is high time to consider what steps should be taken to have such provisions redrafted. On a question of such importance the authoritative voice of this Court should speak.

It may be that this particular issue was more properly covered by section 237 (b) of the Judicial Code, but we believed that since our constitutional point was clearly covered by section 237 (a) it would be better to deal with

the two points together and rely on the provisions of Section 237 (c) as to treating as an application for certiorari an appeal improperly taken.

In conclusion, we submit that Appellee's motion to dismiss or affirm should be denied, and that the present appeal should be entertained by this Court.

Respectfully submitted,

HARRY McCALL,
Attorney for Texas and New Orleans Railroad Company,
724 Whitney Building,
New Orleans 12, Louisiana.

New Orleans, July 12, 1947.

CERTIFICATE.

I hereby certify that copy of the foregoing brief has been served on V. Rivera S. en C., Appellee, by delivery of a copy thereof to Messrs. Deutsch, Kerrigan & Stiles, counsel of record for said Appellee, on July 12, 1947.

....,
HARRY McCALL,
Attorney for Texas and New Orleans Railroad Company,
724 Whitney Building,
New Orleans 12, La.

New Orleans, July 12, 1947.

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Supreme Court, U.S.
FILED
JUL 8 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 197

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Appellant,

vs.

V. RIVERA S. EN C.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EBERHARD P. DEUTSCH,
Counsel for Appellee.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

INDEX

Subject Index

	Page
Motion to dismiss or affirm and statement opposing jurisdiction	1
Motion to dismiss or affirm	1
Statement of grounds making against jurisdiction	2
There is no appealable nor even substantial federal question under the second assignment	3
There is no constitutional question under first assignment	4

Table of Cases Cited

Atlantic Coast Line R. Co. v. *Mazursky*, 216 U. S. 122	5
Charleston & W. C. R. Co. v. *Varnville F. Co.*, 237 U. S. 597	5
Missouri, K. & T. Co. v. *Harris*, 234 U. S. 412	5

Statutes Cited

Act 29 of the Louisiana Legislature of 1908	4
Judicial Code, Sections 237(a), (b) and (c)	3

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SUPREME COURT OF LOUISIANA

No. 38,345

V. RIVERA S. EN C.,

vs. *Appellee,*

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL.,

Appellant,

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

MOTION OF APPELLEE TO DISMISS OR AFFIRM AND STATEMENT OF GROUNDS MAKING AGAINST JURISDICTION.

Comes now the appellee, V. Rivera S. en C., by Messrs. Deutsch, Kerrigan & Stiles, its counsel, and files herewith its motion to dismiss or, in the alternative, to affirm, the appeal, and its statement of grounds making against the jurisdiction of the Supreme Court of the United States of this cause, pursuant to the provisions of Rules 7 and 12 of said Court.

A

Motion to Dismiss or Affirm

Appellee moves the Supreme Court of the United States to dismiss or, in the alternative, to affirm with costs, the appeal taken herein to said Court by appellant, Texas and New Orleans Railroad Company, on the ground that no

appeal lies on the second error assigned by appellant, and that appellee, while satisfied with the validity thereof, has waived the nominal penalties forming the basis of the first and only other error assigned by appellant, and has entered a remittitur with regard thereto in the state court, as hereinafter explained. Appellee submits, in support of said motion, the following

B

Statement of Grounds Making Against Jurisdiction

Only two errors are assigned by appellant. The first deals with a nominal penalty allowed by the state court under an applicable state statute and subsequently waived and remitted by appellee. The second, and only remaining, assignment of error, deals with the finding of the state court, asserted by appellant to raise a federal question, that appellant railroad was a carrier and insurer rather than a mere warehouseman *quoad* certain shipments, "under circumstances and facts such as were presented in this case."[1]

Appellee submits that the second assignment of error presents the only remaining ground of appellant's appeal; that this second assignment does not present a legal ground of appeal; and that the first assignment, involving nominal penalties as to which appellee has since entered a remittitur, was merely the means by which appellant sought to bring before the Supreme Court of the United States, an appeal on its second assignment, which it could not otherwise present to that Court.

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[1] Assignments of Error, 2.

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I

There Is No Appealable Nor Even Substantial Federal Question under Second Assignment

This assignment, on its face, presents no ground of appeal under section 237 (a) of the Judicial Code, since it does not draw in question the validity of any statute or treaty. As stated by appellant itself, this assignment merely presents a "federal question" as to whether the relationship of appellant to certain shipments "was that of a common carrier and not of a warehouseman . . . under circumstances and facts such as were presented in this case."[2]

It may be that appellant might legally have applied to the Supreme Court of the United States for certiorari on this point under section 237 (b) of the Judicial Code; and that, under section 237 (c), the lodging and allowance of an appeal would not alone be ground for dismissal. But even treating this assignment as an application for certiorari, it is apparent that it involves primarily matters of fact and no federal question of substance.

This is apparent from the assignment of error itself, already quoted above. It is equally apparent from the petition for appeal, in which appellant frankly avers[3] that the case draws "in question the interpretation of certain provisions in the conditions of the bills of lading to the effect that under the circumstances of this case," and "as applied to the facts of this case," appellant's "relationship to the shipments in question (was) that of a common carrier and not that of a warehouseman."

The opinion of the Supreme Court of Louisiana too, bases determination of the question on application of "the contractual provisions in the bill of lading . . . to the facts

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[2] *Ibid.*

[3] Petition, Article IV.

and circumstances of the case." To illustrate this point briefly, the attention of the Court is directed to appellee's contention in the state court, that, as a matter of fact—not of law—the shipments were stored by the railroad in the depot in which they were later destroyed, "during the course of their through transit." Appellant contended in the state court that this transit had, on the contrary, been interrupted. The state court resolved this question of fact in appellee's favor, and held that the goods were destroyed in the freight depot in which they had, in fact, been stored "during the course of their through transit."[4]

It is accordingly submitted that appellant's second assignment of error is its only remaining ground of appeal, is not a legal ground of appeal, and presents no federal question of substance in any event.

II

There Is No Constitutional Question under First Assignment

The case involves three shipments of rice by rail over appellant's railroad, from Crowley, Louisiana, to New Orleans, Louisiana, thence to be forwarded by water carrier to Puerto Rico. The judgment of the state court allowed recovery against the rail carrier for loss of the shipments while still in the custody of the rail carrier in Louisiana. A penalty of $50 as to each shipment was awarded by the state court under a Louisiana statute,[5] allowing such a penalty, when judicially imposed, for failure to pay, within thirty days, a claim for loss of goods while in the carrier's possession, "in case of shipments wholly within the State."

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[4] At page 10 of its typed jurisdictional statement, appellant itself seeks to demonstrate the error of another finding of fact by the Supreme Court of Louisiana to the effect that appellant railroad had not made tender of delivery of the goods in question at New Orleans.

[5] Act 29 of 1908.

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Appellant contended, in its original pleadings in the state court of instance, that this state statute allowing this penalty is violative of the commerce clause of the Constitution of the United States. Appellant did not again urge the point, either in pleading, argument or brief, until after the state supreme court had allowed the penalty without comment as to the validity of the statute. Appellant then included this among the points made in an application to the supreme court for a rehearing, and, when that was denied, used this point as its first assignment of error, in an obvious attempt, by this means, to bring its real grievance (the second assignment), on which it has no right of appeal, before the Supreme Court of the United States.

Appellee submits that the question of the validity of the Louisiana penalty statute is foreclosed by previous decisions of the Supreme Court of the United States.[6] This question has, however, become wholly moot and academic because, in order to avoid the possibility of undue and disproportionate expense in the defense of such an appeal in Washington, in light of the purely nominal amount of the penalty involved, appellee waived the penalties after appellant filed its appeal, entered a remittitur for the amount thereof in the state court, and reiterates that waiver here.

It is submitted that the within statement of grounds making against the jurisdiction of the Supreme Court of the United States suffices to support appellee's motion to dismiss or affirm.

(Signed) Deutsch, Kerrigan & Stiles,
Counsel for V. Rivera S. en C., Appellee.

New Orleans, 27 June, 1947.

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[6] *Atlantic Coast Line R. Co.* v. *Mazursky*, 216 U. S. 122 (1910); *Missouri, K. & T. Co.* v. *Harris*, 234 U. S. 412 (1914). *Charleston & W. C. R. Co.* v. *Varnville F. Co.*, 237 U. S. 597 (1915), is clearly distinguishable.

No. 197. TEXAS & NEW ORLEANS RAILROAD CO. *v.* V. RIVERA S. EN C. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Harry McCall* for appellant. *Eberhard P. Deutsch* and *R. Emmett Kerrigan* for appellee. Reported below: 211 La. 969, 31 So. 2d 180.

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